APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED FEBRUARY 13, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of Feb., two thousand three.

PRESENT: HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,
HON. SONIA SOTOMAYOR,
Circuit Judges.

02-2389

CHARLES E. JAMES,

Petitioner-Appellant,

-v.-

VICTOR HERBERT, Superintendent, Attica Correctional Facility; ELIOT SPITZER, New York State Attorney General,

Respondents-Appellees.

Appendix A

Appeal from the United States District Court for the Western District of New York (Elfvin, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the judgment of the district court be **AFFIRMED**.

Petitioner-appellant Charles E. James appeals from a judgment entered in the United States District Court for the Western District of New York (Elfvin, *J.*) on May 30, 2002, denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. James is currently serving a sentence for his 1988 conviction in New York state court on counts of first-degree manslaughter, second-degree (felony) murder, burglary, and assault. On appeal, as in the district court, James argues that his trial counsel had a *per se* conflict of interest that violated his Sixth Amendment right to effective assistance of counsel because his lawyer concealed evidence of James's crime, instructed James to lie to authorities, was arrested for interfering with James's arrest, and eventually faced prosecution for obstruction.[1]

This Court reviews *de novo* the denial of a petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See Ryan v. Miller*, 303 F.3d 231, 245 (2d Cir. 2002). We review the district court's factual findings for clear error. *See Morris v. Reynolds*, 264 F.3d 38, 45 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 2381(2002).

---

1. James asserted other claims in the district court, but the court granted a certificate of appealability "solely on his conflict of interest claim." Judgment in a Civil Case, dated May 30, 2002.

Appendix A

1. James's ineffective assistance of counsel claim finds arguable support in precedents of this Court. *See, e.g., United States v. Fulton*, 5 F.3d 605, 612 (2d Cir. 1993) (holding that a cooperating co-defendant's "allegations that lead trial counsel was engaged with him in heroin trafficking created an actual conflict of interest of the sort that requires application of the *per se* rule"); *United States v. Cancilla*, 725 F.2d 867, 867 (2d Cir. 1984) (recognizing a *per se* conflict of interest where there is evidence that "counsel had himself engaged in criminal activity related to the conduct for which defendant was convicted"); *Solina v. United States*, 709 F.2d 160, 161, 168 (2d Cir. 1983) (recognizing a *per se* conflict of interest where a defendant was represented at trial by a person not admitted to the bar).

2. However, where a habeas petitioner's claim has been "adjudicated on the merits in State court proceedings," our review is circumscribed:

> An application . . . shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). James asserted his ineffective assistance claim in a § 440 motion for post-conviction relief, which the state court denied; the Appellate Division denied leave to appeal.

3. James can rely on none of the exceptions of 28 U.S.C. § 2254(d). First, James does not contend that the state court denied his claim based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2).

Second, the state court ruling did not result in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States.*" 28 U.S.C. § 2254(d)(1) (emphasis added); *see also Gilchrist v. O'Keefe*, 260 F.3d 87, 93 (2d Cir. 2001) (defining "clearly established Federal law" as " 'the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision' ") (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)), *cert. denied*, 122 S. Ct. 1933 (2002). No Supreme Court holding has recognized the particular claim James asserts; the Supreme Court has identified only one circumstance as constituting a *per se* conflict of interest: compelled representation of multiple defendants with divergent interests. *See Holloway v. Arkansas*, 435 U.S. 475, 484-91 (1978). Nor can James establish that the state court "unreasonably failed to extend a clearly established, Supreme Court defined, legal principle to [a] situation[ ] which that principle should have, in reason, governed." *Kennaugh v. Miller*, 289 F.3d 36, 45 (2d Cir.), *cert. denied*, 123 S.Ct. 251 (2002). At least one circuit has expressly declined to follow the rule we announced in *Cancilla* and related cases. *See United States v. Wallace*, 276 F.3d 360, 368 (7th Cir.) (noting Seventh Circuit's rejection of *Cancilla*' s *per se* rule), *cert. denied*, 122 S. Ct. 2592 (2002).

Appendix A

In *Mickens v. Taylor*, 122 S. Ct. 1237 (2002), the Supreme Court recently declined to recognize a *per se* conflict of interest where a defendant who was tried and convicted for murder was represented at trial by a lawyer who had previously represented the murder victim. *Id.* at 1245. The Court observed that it has so far declined to extend *Holloway*'s *per se* rule to other circumstances. *Id.* at 1242. The Court noted that *Holloway* "stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice," *id.* at 1245, and it questioned whether actual conflicts of interest—let alone *per se* conflicts—exist in various contexts in which circuit courts have identified them. *Id.* (citing cases). Thus, *Cancilla* notwithstanding, and however much we might wish to encourage the state courts to follow *Cancilla*, they were not *required* to extend the Supreme Court's *per se* rule to James's situation.[2]

For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:
s/ Lucille Carr
Lucille Carr, Deputy Clerk

---

2. James does not argue that it would be an unreasonable application of clearly established Supreme Court precedent to refuse to apply the "actual conflict" standard set forth in *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980), to the circumstances of this case, and we express no view on that question.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK DATED MAY 29, 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

00-CV-0171E(Sr)

CHARLES E. JAMES,

Petitioner,

-vs-

VICTOR HERBERT, Superintendent, Attica Correctional Facility, and ELIOT SPITZER, New York State Attorney General,

Respondents.

MEMORANDUM and ORDER

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 February 22, 2000 alleging that his conviction had been obtained in violation of his Sixth Amendment right to the effective assistance of counsel. On April 10, 2000 the undersigned referred the petition to then Magistrate Judge Carol E. Heckman for consideration and a Report and Recommendation ("R&R"). Such referral was transferred to Magistrate Judge H. Kenneth Schroeder, Jr. pursuant to a June 1, 2000 Order of Chief Judge David G. Larimer following judge Heckman's resignation April 31,

2000. Judge Schroeder filed his R&R May 17, 2001 recommending that the petition be denied. Petitioner filed objections to the R&R May 29, 2001. Oral argument thereupon was had July 20, 2001 and the matter has thereafter been before the undersigned for disposition.

On October 9, 1987 petitioner had gone to the townhouse of his estranged wife Jane James ("Jane") and, after determining that Anthony Cardulla — with whom he knew her to be having an affair — was inside of the house with her, had broken into her house by throwing a clay flower pot through a sliding glass door. Once inside he had observed Jane wearing nothing but a bra and panties, whereupon he had knocked her to the floor. Petitioner then had taken out a knife and advanced towards Cardulla who was standing on the stairs in his underwear. Jane then had fled to a neighbor's house and called the police while petitioner stabbed Cardulla multiple times causing his death.

Petitioner then had driven to his brother Robert's house and had called Robert's attorney Douglas W. Whitney, Esq. Whitney came to Robert's house and, after speaking to petitioner, arranged for him to surrender himself to the Ontario County Sheriff's Office. However, instead of proceeding directly to the Ontario County Sheriff's Office, petitioner, Robert and Whitney had proceeded to petitioner's house. Petitioner was arrested in his driveway by Ontario County Sheriff's deputies who had responded to Jane's call and discovered Cardulla's body. Whitney was also arrested and charged with obstructing governmental administration.

Appendix B

Petitioner was subsequently charged with seven counts in Ontario County Grand Jury Indictment Number 87-10-222 — *viz.*, (1) second degree murder in violation of N.Y Penal Law §125.25(1)[1] (intentional murder), (2) second degree murder in violation of N.Y Penal Law §125.25(3) (murder while committing a burglary), (3) first degree burglary in violation of N.Y Penal Law §140.30(2) (physical injury to non-participant in the burglary), (4) first degree burglary in violation of N.Y Penal Law §140.30(3) (use of dangerous weapon while committing a burglary), (5) second degree burglary in violation of N.Y. Penal Law §140.25(2) (entering a dwelling), (6) second degree assault in violation of N.Y. Penal Law §120.05(1) (intentionally causing serious physical injury) and (7) second degree assault in violation of N.Y. Penal Law 5120.05(6) (causing physical injury during felony). A jury trial was held in the Ontario County Court before Judge Frederic T. Henry, Jr. from April 21, 1988 to April 29, 1988 during which petitioner testified in his own defense in an attempt to, *inter alia*, establish the statutory defense of extreme emotional disturbance[2] to the first count of the indictment charging him with intentional murder. At the conclusion of the trial, the jury found petitioner not guilty of intentional murder on count one, but guilty of the lesser included offense of first degree manslaughter in violation of N.Y Penal Law §125.20(2). Petitioner was also found guilty on counts two, three, four, five and seven and

---

1. Actually, paragraph 1 of section 125.25. Such is true of the form used in all seven counts.

2. N.Y. Penal Law §125.25(1)(a) holds that justified extreme emotional disturbance is an affirmative defense to a charge of murder in the second degree.

guilty of the lesser included offense of third degree assault in violation of N.Y. Penal Law §120.00(1) on count six. On June 22, 1988 judge Henry sentenced petitioner to an indeterminate sentence of 24 years to life imprisonment.

On May 11, 1994 — *i.e.*, alm ost five years after he had been sentenced — petitioner filed a motion to vacate the conviction and sentence pursuant to N.Y. Crim. Proc. Law §§440.10 and 440.20 on the basis that, *inter alia*, he had received ineffective assistance of counsel because Whitney had had a conflict of interest in that, when Whitney had arrived at Robert's house, Whitney had taken the knife that petitioner had used to stab Cardulla and had put it in the trunk of Whitney's car and had advised petitioner to wash his hands and face and change his clothing, after which Robert had given petitioner some different clothes to wear and had taken the clothes petitioner had been wearing when he had stabbed Cardulla. C. James Mar. 9, 1994 Aff. ¶3. Petitioner states that he does not know what had subsequently became of the knife and the clothing. *Ibid.* Petitioner alleges that Whitney had then advised him to commit perjury during his trial by falsely testifying that he had lost the knife at the crime scene and not to disclose that he had actually given the knife to Whitney and his clothes to Robert. *Id.* at ¶¶6-7, 9. Petitioner further states that Whitney had been a defendant in a criminal case resulting from his arrest for obstructing governmental administration and had commenced a civil case against, *inter alia*, the Ontario County Sheriff for wrongful arrest.[3] *Id.* at ¶¶4, 8-10. Finally, petitioner alleges that Whitney

3. *See Whitney v. Stewart*, 175 A.D.2d 674 (4th Dep't 1991) (affirming dismissal of wrongful arrest case for failure to timely serve a complaint and noting that "allegations [of] emotional and psychological problems stemming from his arrest and subsequent trial" were not an adequate excuse for such).

had had him sign a document transferring a 60,000 pension fund to him, from which Whitney had paid himself legal fees in excess of $35,000 without specific authorization from petitioner. *Id.* at ¶10. Judge Henry denied petitioner's section 440 motion March 14, 1996. On April 15, 1996 petitioner applied to the New York State Supreme Court, Appellate Division, Fourth Department ("Appellate Division") pursuant to N.Y Crim. Proc. Law §460.15 for leave to appeal judge Henry's denial of his section 440 motion; however, the Appellate Division denied such.

Petitioner perfected his July 20, 1988 notice of appeal to the Appellate Division May 13, 1998,[4] arguing that, *inter alia*, he had received ineffective assistance of counsel due to Whitney's misunderstanding of the defense of extreme emotional disturbance.[5] The Appellate Division unanimously affirmed petitioner's conviction December 31, 1998, holding:

> "Defendant was not denied effective assistance of counsel as a result of defense counsel's mistaken belief that, if the jury believed that defendant was acting under extreme emotional disturbance, defendant could be acquitted of count one of the indictment, charging intentional murder, rather than convicted of manslaughter in the first degree under that count. Defendant failed to establish

4. The reason for the almost decade-long delay in the appeal is not discernible from the state court records.

5. The issue of Whitney's alleged conflict of interest was not raised on appeal because the Appellate Division had denied leave to do so.

> actual prejudice as a result of defense counsel's misunderstanding (*cf.*, *People v. Daley*, 172 A.D.2d 619, 621), and we conclude that, on the whole, defendant received meaningful representation (*see*, *People v. Rivera*, 71 NY2d 705, 708-709)." *People v. James*, 256 A.D.2d 1149 (4th Dep't 1998).

Petitioner applied for, but was denied leave to appeal to the New York Court of Appeals March 23, 1999. *People v. James*, 93 N.Y.2d 875 (1999). Petitioner subsequently commenced the present proceeding seeking a writ of habeas corpus.

Petitioner's first claim is that he received ineffective assistance of counsel because Whitney had been unfamiliar with criminal law and mistakenly believed that, by establishing the defense of extreme emotional disturbance, petitioner would be acquitted of count one of the indictment which charged him with intentional murder, rather than simply reducing such count to the lesser included offense of first degree manslaughter. Petitioner alleges that he was prejudiced as a result of Whitney's misunderstanding of such defense in two ways — *viz.*, (1) because Whitney called petitioner to the stand where he "admitted all the necessary elements of both burglary and felony murder" and (2) did not explore the possibility of a plea bargain. Pet. at ¶¶20-30, 32-33, 38-39, 43-44.

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction *** has two components. First, the defendant must show that counsel's performance was deficient. This requires showing

> that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In his R&R, Judge Schroeder concluded that he need not consider whether Whitney's representation of petitioner was deficient due to his misunderstanding of the defense of extreme emotional disturbance because petitioner could not show any prejudice resulting therefrom because, due to the

> "overwhelming evidence against [petitioner] presented by the prosecution, the result of the proceeding undoubtedly would have been the same had [petitioner] never taken the stand. Accordingly, the Court finds that [petitioner] cannot show prejudice based on alleged ineffective assistance of counsel, including any misunderstanding of the effect of extreme emotional distress [*sic*] defense his defense counsel may have had." R&R at 9, 13.

Petitioner objects to such portion of the R&R on three grounds — *viz.*, judge Schroeder should have considered

(1) whether Whitney's representation was deficient due to his misunderstanding of the defense of extreme emotional disturbance, (2) whether he was prejudiced by Whitney's misunderstanding of such defense because he admitted the elements of burglary in the witness chair in his attempt to establish such defense thereby ensuring his conviction for burglary and consequently for felony murder and (3) whether he was prejudiced due to Whitney's failure to explore the possibility of a plea bargain. Objections at 2-7.

A careful review of the record reveals that Whitney did not believe that successfully establishing the statutory defense of extreme emotional disturbance precluded conviction of the lesser included defense of first degree manslaughter, but rather that it did not automatically result in a conviction of first degree manslaughter. Tr. VII at 95-101; Tr. VIII at 2-5. Furthermore, the wording of the verdict sheet submitted to the jury[6] actually supported Whitney's "understanding" of

---

6. *"COUNT ONE — MURDER, SECOND DEGREE*

With intent to cause death of another, causes such death.

Guilty
or
Not Guilty

If Guilty, consider defense of Extreme Emotional Disturbance which, if sustained, reduces charge to Manslaughter.

If Not Guilty, of principal count, consider Lesser Included Offense of Manslaughter, First Degree — With Intent to cause serious physical injury to another, he causes death of such person.

Guilty
or
Not Guilty

(Cont'd)

the defense of extreme emotional disturbance because it allowed the jury to find petitioner guilty of having committed second degree murder while under extreme emotional disturbance and nonetheless find him not guilty of first degree manslaughter. However, such is irrelevant, because the jury found petitioner not guilty of intentional murder. The jury circled "Not Guilty" in regard to intentional murder and "Guilty" in regard to the lesser included offense of first degree manslaughter.[7]

(Cont'd)

If not Guilty of principal count and above lesser included offense, of Manslaughter, First Degree, consider further Lesser Included Offence of Manslaughter Second Degree — Recklessly causes the death of another person.

Guilty
or
Not Guilty"

7. The genesis of the argument that the jury actually found petitioner guilty of intentional murder and then reduced such to first degree manslaughter appears to he when the court clerk asked the jury what its finding was regarding "murder in the second degree as charged in the first count of the indictment; guilty or not guilty?," and the foreman of the jury inconsistently responded "Guilty, due to extreme emotional disturbance." Tr. VIII at 94. Due to this inconsistency, judge Henry asked the jury foreman

> "I assume, if this is correct, you found him guilty of murder in the second degree?
>
> "THE JURY FOREMAN: Right.
>
> "THE COURT: However, you found he acted under extreme emotional disturbance?

(Cont'd)

Appendix B

To the extent that petitioner argues that he was prejudiced by Whitney's misunderstanding of the defense of extreme emotional disturbance because, in his attempt to establish such defense, he admitted the elements of burglary during his testimony thus ensuring his conviction of felony murder and negating any benefit from the successful establishment of an extreme emotional disturbance defense, such is not borne out by the trial transcript. During his testimony, petitioner consistently denied having an intention to commit a felony inside Jane's townhouse at the time he broke into it, rather arguing that he became enraged when he saw Jane and Cardulla in their underwear after he had entered — Tr. V at 148, 151-153; Tr. VII at 144-145 — and if the jury had believed petitioner's testimony on this subject it would have found him not guilty of burglary and consequently not guilty

---

(Cont'd)

"THE JURY FOREMAN: Right.

"THE COURT: Which results in a reduction, a reduced charge or finding of manslaughter, first degree —

"THE JURY FOREMAN: Right.

"THE COURT: (continuing) — is that correct?

"THE JURY FOREMAN: Yes." *Id.* at 96-97.

However, the verdict rendered by the jury cannot be singlehandedly changed by its foreman in response to leading questioning from the trial judge and, as it stands, the jury found that petitioner was found not guilty of intentional murder because he did not intend to kill Cardulla, therefore petitioner could not have suffered any prejudice as a result of Whitney's misunderstanding of the defense of extreme emotional disturbance.

of felony murder. Inasmuch as petitioner's allegations concerning the extent of Whitney's misunderstanding of the defense of extreme emotional disturbance and petitioner's admission of the elements of burglary while testifying in an attempt to support such defense are not borne out by the record petitioner's allegation that he was prejudiced by Whitney's alleged failure to explore the possibility of a plea bargain due to his misunderstanding of the defense of extreme emotional distress is also without merit because, had the jury believed petitioner's testimony, it would have found him guilty only of manslaughter and assault and he could not have hoped for a more favorable outcome through a plea agreement. Accordingly, Whitney's misunderstanding of the defense of extreme emotional disturbance did not render his assistance deficient for purposes of the Sixth Amendment and this Court finds that on the record as a whole, petitioner received effective assistance of counsel.

Petitioner's second claim is that he received ineffective assistance of counsel because of Whitney's alleged conflict of interest. Pet. at ¶¶13, 15-19, 29. Judge Schroeder recommended that this claim be denied because petitioner

> "has failed to demonstrate any *** divergence between his interests and those of his attorney. The fact that his attorney was charged with obstruction of governmental administration[8] could

8. The R&R stated that this "charge arose out of [Whitney's] verbal conduct when [petitioner] was arrested, and was dismissed." R&R at 14 n.20. The R&R appears to have credited Whitney's account of the reason for his arrest — Whitney Nov. 30, 1987 Aff. at ¶¶10-11

(Cont'd)

> have no bearing on his conduct as plaintiff's counsel, and, even if [petitioner's] allegations concerning his attorney's advice and conduct about the knife and clothing were true, they do not support a finding that his attorney's interest and conduct were in conflict with a plausible line of defense or attach on the prosecution's case or in any way diverged from [petitioner's] interests." R&R at 16.

Petitioner objects to such portion of the R&R on the basis that Judge Schroeder should have found that Whitney had a conflict of interest or, alternatively, conducted an evidentiary hearing into such. Objections at 2, 7-9. There is no evidence tending to establish that Whitney had had a conflict of interest which had affected his representation of petitioner; petitioner did not even raise such allegations until almost five years after he had been convicted and sentenced and, inasmuch as the trial court — which had had the opportunity to judge petitioner's credibility — did not find an evidentiary hearing to be warranted based upon petitioner's allegations, this Court does not either.

Accordingly, it is hereby *ORDERED* that petitioner's objections to the R&R are overruled, that the R&R is adopted,

---

(Cont'd)

—; however, the prosecution stated that Whitney had been arrested for interfering with the physical arrest of petitioner — Tantillo July 18, 1994 Aff. at ¶8 — and it appears that the charges against Whitney were not dismissed but were still pending during petitioner's trial — Tantillo July 18, 1994 Aff. Ex A. (Mar. 2, 1988 Letter from Whitney to Judge Dwyer) — and that Whitney was later tried on such charges. *See supra*, footnote 3.

that the petition is dismissed, that petitioner is granted a certificate of appealability solely on his conflict of interest claim and that this case shall be closed in this Court.

DATED: Buffalo, N.Y
May 29, 2002

s/ John T. Elfvin
JOHN T. ELFVIN
S.U.S.D.J.